No. 15428

United States Court of Appeals

for the Ninth Circuit

R. H. W. LEATHERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the District of Oregon

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No. 15428

United States Court of Appeals

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R. H. W. LEATHERS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

Appellant's Opening Brief

Appeal from the United States District Court for the District of Oregon

APPELLANT'S OPENING BRIEF

This is an appeal by an accountant, R. H. W. Leathers, from a conviction of a charge of violating 26 U.S.C. §145(b) (1939 Internal Revenue Code), by knowingly filing a false return for one of his clients, Russell A. Peterson, for the year 1946. Mr. Leathers was found not guilty on a second count charging violation of 26 U.S.C. §3793 (b)(1), (1939 Internal Revenue Code), involving the same return. The defendant was sentenced to thirty months imprisonment.

JURISDICTIONAL STATEMENT

The Jurisdiction of the District Court over the alleged offense is conferred by 26 U.S.C. §145(b) and §3793(b)(1), [Internal Revenue Code of 1939], and of this Court, on appeal, by 28 U.S.C. §§1291, 1294 (1).

STATUTES INVOLVED

1. 26 U.S.C. §145(b) as of 1947, [as relevant, now 26 U.S.C. §7201] provided:

> "* * * and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

2. The relevant portion of the Fifth Amendment to the Constitution is:

> "* * * nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

QUESTIONS INVOLVED

1. Did the government present a prima facie case to support its charge that defendant—the accountant—did "wilfully and knowingly attempt to evade a large part of the income tax due and owing by Russell A. Peterson . . . [the taxpayer] for . . . 1946, by filing and causing to be filed . . ." a false return showing Peterson's net income as $16,910.55, and tax as $4,010.25, when the true income was $56,910.05 and tax was $28,977.41?

2. Were the books and records of Peterson's Sea Foods (Exhibits 14, 15 and 16), and the summary sheet prepared by Peterson's bookkeeper (Exhibit 17) connected to defendant, and did the court erroneously permit extensive use of the books and summary sheets?

3. Did the court so erroneously curtail defendant's attempt by cross examination of Peterson—the taxpayer—to show a basis for bias, prejudice or interest, and to show inconsistent positions as to deprive defendant of a fair trial?

4. Did the closing argument of the government deprive defendant of rights guaranteed by the Fifth Amendment to the Constitution of the United States?

MANNER IN WHICH QUESTIONS RAISED

(1) The prosecution did not present a prima facie case of violation of 26 U.S.C. §145 (b) [1939 Code].

This case involves the 1946 tax return of Russell A. Peterson, proprietor of a fish and crab processing plant known as "Peterson's Sea Foods", located on the Oregon Coast in the vicinity of North Bend. (Tr. 58). The defendant—an accountant—prepared Peterson's tax returns, (Tr. 71), and is charged with wilfully falsifying the returns in order to evade Peterson's tax.

The allegation of a false return turns on the reporting of gross receipts. The return shows gross recipts as $236,-555.64. (Ex. 3, Schedule C). The government over objection offered testimony to show gross recipts of $277,555.64. (Tr. 79, Exs. 14-17).

The testimony is that Leathers signed both his and Peterson's names to the return (Tr. 54), and stamped the return "This return prepared by me from figures furnished by the taxpayer". (Ex. 3).

The government introduced no evidence to show that defendant ever saw, had in his possession, had access to Peterson's Sea Foods' books (Exs. 14-16) or the summary sheets (Ex. 17), or had any basis for a belief that the return was false. This fact is established by examining the testimony of each witness as to the books of Peterson's Sea

Foods and the method employed by defendant to compute the tax.

The witnesses Roswell J. DeMott, Robert A. Leedy, Stanley McDonald, Victor Ferrara, Cecil Tucker, and William C. Weber, Jr., gave no testimony relative to custody, possession, or control of Peterson's books and records or the preparation of the return.

Robert D. Amos, a special agent of the intelligence division of the Internal Revenue Service, (Tr. 48) testified to a conversation with defendant on August 15, 1952 (Tr. 172). Amos testified that Leathers told him that he had prepared the return from a work sheet, which contained figures copied from data furnished him. (Tr. 168). Amos testified that he saw the sheet briefly and noticed erasures on the work sheet, specifically mentioning the net profit item, but had no recollection of any details. (Tr. 168).

Will G. Barrow, Peterson's bookkeeper, testified that he "didn't personally deliver it" (Tr. 78), and "that maybe once or twice I took the abstract over to Mr. Peterson's house and left it there to be picked up." (Tr. 118). He did not testify to either giving Peterson's books to the defendant, or giving the summary sheet to defendant, or to any knowledge of the defendant having the books or summary sheet.

Oran T. Cosper, a long time Revenue Agent (Tr. 156), first met with defendant while investigating Peterson's re-

turns (Tr. 157). This was about February 8, 1952 (Tr. 158). He contacted the defendant in Reedsport, asked for papers relative to Peterson's return, and saw only one slip of paper with no figures on it (Tr. 157). Cosper had several other conferences with defendant at Reedsport and Eugene (Tr. 158). In July 1952 he conferred with defendant in the Eugene office of defendant's attorneys (Tr. 159). At that time Mr. Cosper saw Peterson's returns and some papers "associated" with them (Tr. 159). He did not recall how the papers were "associated" (Tr. 159). Mr. Cosper gave no other testimony relative to the preparation of the return, and gave no testimony that defendant ever had access to Peterson's Sea Foods' books or records.

Russell A. Peterson—the taxpayer—told the defendant to get the information from the company's bookkeeper Barrow (Tr. 132). Peterson gave no information to the defendant (Tr. 132). Peterson had no knowledge of his own of any records which defendant may have had (Tr. 137).

To summarize: Peterson said he told defendant to get figures from Barrow; Barrow said he did not give the books or summary to defendant; government agents Amos and Cosper briefly saw a sheet which Amos testified tallied with the return. But—there is no evidence to show defendant knew the gross receipts were as alleged by the government, and no evidence to show any wilful intent to evade Peterson's taxes. There is no evidence to show Leathers

had any reason to believe the figures on the return were not accurate.

Defendant raised the issue of insufficient evidence by motion for directed verdict of acquittal before resting without putting on a case (Tr. 190-197).

(2) Admission, relevance and connection to defendant of Peterson's Sea Foods' books.

The books of Peterson's Sea Foods were Exhibits 14, 15 and 16. Exhibit 17 is a carbon copy of a summary of Peterson's books prepared by his bookkeeper, the witness Will Barrow. (R. 78). The defendant continually, vigorously and unsuccessfully objected to the introduction and use of Exhibit 17 (p. 77, 79, 80, 90-91, 92, 120, 161, 168-169).

The bases of the objections to the introduction into evidence and subsequent use of Exhibits 14-17 were lack of foundation (Tr. 77, 168), as not the best evidence (Tr. 91, 161, 168), failure to connect to the defendant (Tr. 77, 91, 161, 168), and comparison and interpretation of exhibits which speak for themselves (Tr. 90, 120, 161, 168).

(3) Curtailment of cross examination of the witness Russell A. Peterson—the taxpayer—to show bias, prejudice, interest and inconsistent position.

During cross examination Peterson volunteered that the government had not attempted to collect the alleged deficiency. (Tr. 148). The defendant's trial counsel sought

to inquire as to whether the government had pressed any claim against Peterson so as to show bias or interest of Peterson as a witness. The government's objection to this line of inquiry was sustained (Tr. 148-150). The government agent, Tucker, admitted that the record showed that no additional assessments were made against Peterson (Tr. 42). Defendant's trial counsel asserted that the purpose of his inquiry was to inquire of "any interest . . . anything else he [Peterson] may have obtained from the prosecution . . ." (Tr. 148). Nevertheless the government's objection was sustained. (Tr. 149-150).

Defendant's exploration of settlement of an accounting suit between him and Peterson was curtailed on objection of the prosecution. (Tr. 142-146). Evidence of this settlement objected to by the government when testimony was being taken, was then the subject of comment on failure to produce in closing argument. (Tr. 211).

4. Improper argument of prosecuting attorney.

Apart from questions of evidence, the defendant moved to dismiss or alternatively for a mistrial because of statements made by the United States Attorney in his concluding argument. (Tr. 223-224). The basis of the asserted error is comment upon evidence which could be produced only by testimony of defendant or his attorneys, and upon the failure to produce evidence in regard to the settlement between Peterson and defendant. When defendant attempted to cross examine Peterson about the settlement,

the government's objections to the line of inquiry were sustained. On this appeal the defendant does not urge error in denial of his motion to dismiss based upon the prosecutor's argument, but does assert error in the failure to declare a mistrial. The portion of the argument which defendant asserts entitled him to a mistrial is found at Tr. 211, 214:

> "Now, there is always a great deal of stress laid upon the fact that Mr. Peterson disclaimed that he had made assertions for these particular funds against Mr. Leathers and that stuff. Where is the settlement, if the settlement is so important that the defendant entered into with Mr. Peterson? What other items were asserted, and so forth? What are the circumstances that went into any such settlement? (Tr. 211).
>
> * * *
>
> "Now, Ladies and Gentlemen of the Jury, where would you find a wilfull intent on the part of Mr. Peterson? The inference without any evidence to support it, no work sheet other than this 17, being exhibit 17, being in evidence, the inference is that Mr. Leathers, although there is no evidence whatsover to support it, again, I say is that he had some other work sheet. Where is such a work sheet? Where is whatever it was that Mr. Leathers showed to Mr. Amos at the office of Mr. Vonderheit? If there is another one, where is it ...? * * * There is no point bringing in Carlson in here with conversation we couldn't record on the witness stand of his conversations with Mr. Peterson. So, talking about matters not introduced here to refute the Government's case where, if there is a different work sheet, if Mr. Peterson altered his work sheet and handed it to Mr. Leathers, where is it?" (Tr. 214).

SPECIFICATION OF ERRORS

Failure to Prove Violation of 26 U.S.C. §145(b).

1. The trial court erred in denying defendant's motion for a directed verdict of acquittal on Count 1 of the indictment. (Tr. 190-197).

Admission and Use of Peterson's Sea Foods' Books and Records.

2. The trial court erred in admitting Exhibit 17 into evidence, the substance of which exhibit is a purported summary of Peterson's Sea Foods' books, showing a statement of gross receipts and a particularization of expenses of Peterson's Sea Foods over defendant's objections that: (Tr. 77).

> "Mr. Darling: The first objection we would have would be that there has been no proper foundation laid, that this is not the best evidence, this is a carbon copy, and no foundation has been laid or explanation showing why the best evidence is not introduced."

3. The trial court erred in permitting the following series of questions of the witness Barrow interpreting Exhibit 17 over defendant's objections (Tr. 90-92).

> "Q. May I inquire, Mr. Barrow, can you tell us whether or not, [110] however, the sum $236,555.64 corresponds to the total receipts as you computed them from the books and records?
>
> "Mr. Darling: No, just a minute. Your Honor, we would like at this time again to preserve our objection

to any testimony from this Exhibit 17. It is on the grounds that it is not the best evidence and that there has been no showing that it is relevant in any way in this case as having ever come into the hands of the accused in this case. And any such testimony, without such a foundation, in our opinion is irrelevant and prejudicial and should not be admitted until such time as they do lay a proper foundation. So, both for the lack of proper foundation and the fact that it is not the best evidence, we object, and also because it is irrelevant and immaterial."

* * *

"The Court: I think technically, Mr. Luckey, we might avoid the objection if you will just ask him to read what the exhibit shows.

"Mr. Luckey: Thank you.

"Q. What does the exhibit show, Mr. Barrow, with reference to total receipts, Exhibit No. 17?

"A. The total of the receipts, merchandise, sales, gross, is $277,555.64 with an allowable deduction, as I said before, of commissions paid from the face of the invoice of $4,364.64. The results would be the net sales."

4. The trial court erred in permitting the following series of questions of the witness Cosper interpreting Exhibits 14, 17 and 16 over defendant's objections (Tr. 160-162):

"Q. Did you reconcile or did you compare those with the returns? A. I did.

"Mr. Darling: If the Court please——[188]

"The Court: Yes.

"Mr. Darling: ——I wish at this time to interpose an objection to any testimony by this witness with reference to findings that he made by any comparison of Exhibit 3 with these records, on the ground that there has been no foundation laid to show that these were the records, were the authentic records as kept by Mr. Barrow. Mr. Barrow said that he had not examined them, that they appeared to be the records but he did not examine them and could not testify as to their authenticity. For all the record shows, they could have been in other hands and altered pages put in or something of that type. We further object on the ground that the Exhibit 17 is the exhibit that we have objected to all the way along as not being the best evidence, no testimony that was ever shown to the defendant in this case or that the defendant had ever had any access to the records. In fact, there is positive testimony by the Government that there was never any access by Mr. Leathers or he did not have any—did not at any time consult any of the books himself. And to that extent we make our objection to any testimony, to any findings that he made from these comparisons of the various records.

"The Court: Objection overruled.

* * *

"Q. What did you find with reference to that comparison?

"A. Well, the sales on the return was understated forty-one thousand dollars under the total sales shown in the ledger and shown on Exhibit 17."

5. The trial court erred in overruling defendant's objection to the following series of questions relating to Russell A. Peterson's personal expenditures asked of the witness Barrow, Tr. 119-120):

"Q. Exhibit 17 would show you?

"A. That's all right. Either one or both."

(Whereupon the Crier hands a document to the witness.)

* * *

"Mr. Darling: We would object on the ground it is incompetent, irrelevant and immateral.

"Mr. Luckey: I think, your Honor, that the next question will be if these expenditures were made from the business receipts for the year in question.

"The Court: I see. You may inquire.

"Mr. Darling: We would like at this time, since the [142] defendant—the witness has Government's Exhibit 17—we would like at this time to again renew our objection as previously made to the use of Government's Exhibit 17.

"The Court: Objection overruled.

"Mr. Darling: Exception, please.

"The Witness: Now, this is it—taken from the control ledger, and it is Mr. Peterson's account, which was 500. Mr. Peterson personally spent $22,007.85."

Curtailed Cross Examination of Russell A. Peterson

6. The trial court erred in sustaining the government's objection to defendant's cross examination of Russell A. Peterson as to whether the government had ever indicated that he would not be liable for his taxes. The question and objection are at page 148 of the transcript:

"Q. Have they ever indicated to you that you would not be liable for the taxes?

"A. They—

"Mr. Luckey: If the Court please, I have to object to that as being irrelevant.

"The Court: Objection is sustained.

"Mr. Darling: Might I make a record, the reason for the inquiry?

"The Court: You may.

"Mr. Darling: The basis of that inquiry, it is our understanding that we are at all times entitled to inquire of any witness concerning any interest, any promise of [174] immunity, anything else that he may have obtained from the presentation in a case like this.

"The Court: He said the Government has said nothing to him about it.

"Mr. Darling: Well, I was merely addressing a further question on that same line.

"Mr. Luckey: If he wants to ask him if he has been promised any immunity or anything, that would be fine.

"The Court: It is entirely different from whether or not the Government is pressing any claim against him. I will abide with my ruling."

7. The trial court erred in sustaining the Government's objection to defendant's cross examination of Russell A. Peterson as to whether the Government had ever made a demand upon him for his taxes. The question and objection are at page 150 of the transcript:

"Q. Well, now since that time has the Government ever made any demand upon you for the payment?

"Mr. Luckey: If the Court please—

"Mr. Darling: — — of the difference between the tax as shown on the 1946 return and the tax that they claim should have been paid based on what they and you considered to be your true income for the year 1946?

"Mr. Luckey: If the Court please, I have to renew the same objection that I have been making to the same type of inquiry as to whether or not the Government has made demands upon the witness for the difference in the tax on the same [176] basis that it has been urged and sustained before.

"The Court: It will be sustained."

8. The trial court erred in sustaining government's objection to cross examination of Russell A. Peterson to show his prior inconsistent position. The question and objection are found at pages 145-147 of the transcript:

"Q. Just a minute. Don't tell us what somebody else said. Isn't it also true, Mr. Peterson, that in the course of that settlement and as a part of the settlement you did not make any demand and did not require Mr. Leathers to make good any sum to the Federal Government?

"A. You would have to contact my attorney.

"Mr. Luckey: If your Honor please—[171].

"The Court: Just a moment. What is it?

Mr. Luckey: Mr. Darling asked him to state whether or not he could require any sum to be paid to the Federal Government. I suggest that it would be impossible for Mr. Peterson to require it.

"Mr. Darling: Well, if the Court please, if I may make that clear, the reason for that statement is that when I asked him whether or not in the course of his

settlement he made any demand against Mr. Leathers that Mr. Leathers had obtained some sixteen thousand dollars from him in property he said, 'No, that was to be paid by Mr. Leathers to the Government.'

"The Court: Yes.

"Mr. Darling: Then I feel on the basis of that I have the further right to inquire, well, then, as a part of the settlement did he require Mr. Leathers to make good that sum.

"The Court: Well, you are going on the assumption that he had some duty to make such a request and that he didn't do it and that, therefore, what he now claims is adverse to his position.

"Mr. Darling: I am going on the assumption and, of course, we will make our argument on that basis, that if the situation was as he is now claiming that Mr. Leathers owed him sixteen thousand dollars by reason of his ten thousand dollar [172] check and this ten thousand dollar note that he gave.

"The Court: I don't understand the Government is so contending.

"Mr. Darling: Well, that is the whole theory of this case, as we see it.

"'The Court: Well, I will sustain the objection."

Improper Argument of Prosecuting Attorney

9. The trial court erred in denying defendant's motion for a mis-trial (Tr. 223-224) based upon the improper closing argument of the United States Attorney in commenting on defendant's failure to produce evidence provable only by defendant's testimony or the testimony of defendant's attorney (Tr. 211, 214).

ARGUMENT

SUMMARY

The defendant contends that there is absolutely no testimony to show that he had any knowledge of the gross receipts of Peterson's Sea Foods.

The defendant claims error in two particulars related to the curtailment of his cross examination of Peterson, the taxpayer. First, denial of his right to show Peterson's financial interest in cooperating with the prosecution. Second, denial of his right to show Peterson's prior inconsistent position in civil litigation between Peterson and defendant. In that litigation Peterson was given an accounting from defendant and did not claim the moneys which he now testifies were paid defendant on account of taxes.

While the use of Peterson's Sea Foods' books were necessary to satisfy the prerequisite of proving a tax due, they should not have been admitted for any other purpose until connected with the defendant. The repetitious interpretation of these books and the summary sheet was also error in view of the failure to connect them to the defendant.

During closing argument the United States Attorney eight or nine times asked where records were which could only have been in the possession of defendant or his counsel and could only have been introduced by testimony of defendant or his counsel. This argument constituted a com-

ment on defendant's failure to testify and deprived defendant of due process and his privilege against self-incrimination.

I.

DEFENDANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL ON COUNT ONE SHOULD HAVE BEEN GRANTED.

A. There is no evidence that defendant wilfully evaded Peterson's taxes. (This brief, *supra,* pp. 4-7, Tr. 78, 118, 132, 137, 157-159).

B. When there is no evidence of intent to wilfully evade a tax, there can be no conviction.

Bloch v. United States, (9 Cir., 1955), 221 F.2d 786.

United States v. Lindstrom, (3 Cir., 1955), 222 F.2d 761.

Jones v. United States, (5 Cir., 1947), 164 F.2d 398.

The record relative to the charge as discussed, supra, 4-7, taken as most favorable to the prosecution shows:

1. That Peterson owed more taxes than he paid.

2. That Peterson's Sea Foods' books prove that Peterson underpaid his tax.

3. That defendant signed both his and Peterson's name to the tax return.

The record affirmatively shows that none of the witnesses had any knowledge of defendant ever having access to the books and records which the government relied upon to show Peterson's underpayment. (Supra, pp. 00). There is nothing in the record to show that defendant had any knowledge that he was under-reporting Peterson's income. The suggestion that defendant may have had evil motives relative to Peterson's property are totally irrelevant.

The law is clear that no conviction may be had under former 26 U.S.C. §145(b) without proof of actual intent to cheat the government. This court thoroughly analyzed the problem in *Bloch v. United States,* 221 F.2d 786, and affirmed its conclusion in opinion denying a petition for rehearing at 223 F.2d 997. The holding of the court was that to sustain a conviction a state of mind to cheat the government must be proven, at 221 F.2d 789:

> "In this Section 145(b) tax evasion case there is only one state of mind that will supply the intent necessary to sustain a conviction, and that is the intent to defeat or evade the payment of the tax due. Nor would filing a false return with any bad purpose supply the necessary intent. *The bad purpose must be to evade or defeat the payment of the income tax that is due.* Nor would filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do constitute in themselves the intent which is required under the section. (Emphasis Supplied).

* * *

> "The practice of attempting to convict a defendant not of the crime of which he is charged, but rather of being an all around, no good dissolute person, is foreign to our system and is disapproved by this Court."

This rule, that an intent to cheat the government must be proven, is affirmed by other Circuits. Proof that a family partner understates income, is not proof of wilful evasion. *United States v. Lindstrom,* (3 Cir., 1955), 222 F.2d 761. Intent is never presumed. Even the failure to return income and pay a tax is not sufficient to establish intent. *Jones v. United States,* (5 Cir., 1947), 164 F.2d 398.

Here we do not even have testimony to show knowledge of under-reporting. We have no evidence of intent to evade taxes. It therefore follows that defendant's motion (Tr. 190-197) for a directed verdict on Count 1, charging violation of 26 U.S.C. §145(b) (Internal Revenue Code of 1939), should have been allowed.

II.

PETERSON'S BOOKS WERE IMPROPERLY ADMITTED AND USED.

A. There is no testimony to connect defendant with the books and records of Peterson's Sea Foods (Tr. 78, 95, 118, 132, 137).

B. The books and records are not evidence against defendant (Tr. 78, 91 supra pp. . . .).

Defendant recognizes that the government must attempt to prove that taxes were underpaid, and that the taxpayer's books may be used for this purpose. However, the taxpayer's books (Exs. 14, 15, 16) and the taxpayer's bookkeeper's summary (Ex. 17) were repeatedly and continually the subject of direct examination seeking interpretations and analysis over defendant's vigorous objection (Tr. 77, 79, 80, 90-92, 120, 161, 168-169). These exhibits were never connected to defendant. (Supra, pp. 4-7).

The Court recognized that until such connection, the taxpayer's books were not binding on defendant. (Tr. 78). Indeed the original admission of the bookkeeper's summary was solely to show his analysis of the books. (Tr. 91).

The defendant submits that the continual use of the taxpayer's books created an environment in which they were associated with and bound the defendant. In view of the total failure of proof that defendant had access to the exhibits, despite earlier assurances by the government (Tr. 78), use of the books for any purpose other than showing a tax deficiency constituted error.

III.

DEFENDANT'S IMPEACHING CROSS EXAMINATION OF RUSSELL A. PETERSON TO SHOW BIAS, PREJUDICE, INTEREST AND INCONSISTENCY WAS ERRONEOUSLY CURTAILED.

A. Peterson had an interest in avoiding or reducing his potential tax liability.

B. The evidence shows that Peterson may have had a hope of reducing his tax liability by testifying against defendant (Tr. 148).

C. The evidence shows civil litigation between Peterson and defendant (Tr. 144).

D. Defendant had a right to place Peterson in his proper setting, to show claims he may have had against defendant, to show bias, and to show beliefs or hopes Peterson may have had for favorable treatment by the government.

Alford v. United States, (1931) 282 U.S. 687, 51 S. Ct. 218, 75 L.Ed. 624.

United States v. Cohen, (3 Cir., 1947), 163 F.2d 667.

McFarland v. United States (D.C., C.A., 1949), 174 F.2d 538.

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Meeks v. United States (9 Cir., 1947), 163 F.2d 598.

Gordon v. United States, (1953) 344 U.S. 414, 73 S. Ct. 369, 97 L.Ed. 447.

Villaroman v. United States (D.C., C.A., 1950), 184 F.2d 261, 21 A.L.R. 2d 1074.

Defendant is charged with attempting to evade Peterson's income taxes for 1946 to the amount of $24,967.16. (Tr. 4). This figure is reached by subtracting the amount paid, $4,010.25, from the total allegedly due $28,977.41 (Tr. 4).

Peterson claimed he gave $16,000 to defendant to pay his tax (Tr. 147). Peterson also claimed to have no knowledge of the return itself, but asserted that defendant had prepared it. (Tr. 157). Peterson admitted that the government had made no demand on him for any tax deficiency (Tr. 148). At that point defendant's counsel cross questioned Peterson (Tr. 148):

> "Q. Have they [the Government] ever indicated to you that you would not be liable for the taxes?"

The government's objection based on relevancy was allowed. (Tr. 148).

The evidence shows litigation between Peterson and defendant, and Peterson's belief that to get satisfaction he "had to sue him (defendant)." (Tr. 144). In the course of settlement of that accounting suit, Peterson made no de-

mand for the $16,000 he testified he gave defendant. (Tr. 145). This testimony was inconsistent with his testimony during trial of payment to defendant of $16,000 for taxes. It is inconsistent because it showed that at a prior time, when if Peterson had paid the monies to defendant on account of taxes he could have demanded an accounting, he entertained no belief that he was due an accounting for the $16,000. It shows that Peterson at the time of the accounting did not contend that he paid $16,000 to defendant in the belief that defendant had paid $16,000 on account of Peterson's taxes. The government, despite prevailing in its objection to exploration of the civil settlement and litigation, commented in closing argument on the fact that the defendant had not produced it and asked the terms of the settlement. (Tr. 211).

The evidence shows an active animus on Peterson's part, and an interest in escaping both criminal and civil liabilities.

Under such circumstances defendant has a right to place Peterson—the taxpayer and the chief prosecution witness—in his proper setting—to show inconsistencies—to show any interest or prejudice—to show any expectancies he may have had in return for his testimony.

Hence, in *United States v. Cohen,* (3 Cir., 1947), 163 F.2d 667, an OPA prosecution involving alleged over ceiling sale of an automobile, reversible error was found in the refusal of the court to permit cross examination of the

chief prosecuting witness as to a $1,300 civil demand against defendant. The Court cited *Alford v. United States,* (1931), 282 U.S. 687 at 692, 51 S. Ct. 218, 75 L.Ed. 624 for the principal that:

> "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and credability to a test, without which the jury cannot fully appraise them."

The *Alford* Case, while recognizing the power of the trial court, establishes broad standards of permissible exploratory cross examination to show bias, prejudice, or fear on the part of the witness.

It is true that the trial court permitted inquiry as to whether immunity from criminal liability had been promised Peterson. However, promises of criminal immunity are rare. That was recognized in *Farkas v. United States,* (6 Cir. 1924) 2 F.2d 644, an extortion case in which error was found in the refusal to permit impeaching cross examination of accomplices who had plead guilty and were awaiting sentence. At 2 F.2d 674:

> "Concededly promises of immunity are admissible; they are, however, rarely made . . . the relevant evidence is not alone the acts or attitude of the district attorney but anything else that would throw light upon the prosecuting witnesses' state of mind. It is therefore entirely proper . . . to show a belief or even a hope . . . that he will secure immunity or a lighter sentence, or any other favorable treatment in return for his testimony, and that, too, even if it be fully conceded that

> he had not the slightest basis from any act or word of the district attorney for such a belief or hope."

It is therefore not the enforceability of the hope for favor—but the existence of the hope which is an appropriate subject of cross examination. Similarly, it is error to exclude a showing of a basis of fear or of sanctions on the part of prosecution witnesses. In *United States v. Beekman,* (2 Cir., 1946), 155 F.2d 580, an OPA case, the Court pointed out that witnesses subject to government supervision "might be facile witnesses against other alleged offenders." Error was found in the refusal to permit the defense to show this basis of fear—the opposite face of which is a hope for reward or pardon.

The rule permitting inquiry into the state of mind of a witness—his hopes and fears—is most frequently applied when the fate of a witness is in the hands of another person, usually a court. *Gordon v. United States,* (1953), 344 U.S. 414, 73 S. Ct. 369, 97 L.Ed. 447, *Meeks v. United States,* (9 Cir., 1947) 163 F.2d 598. Here the fate of Peterson was in the hands of the Internal Revenue Service. The Service could demand almost $25,000 from Peterson—or they could forget about it and administratively forgive him.

When the basis of a witness' prejudice may be personal animosity, there are no limits to the exploration of the source of that prejudice. Hence, in *McFarland v. United States,* (D.C., C.A., 1949), 174 F.2d 538, a perjury charge,

the appellate court found reversible error in denying defendant the right to show that the prosecuting witness engaged in extra-marital intercourse with the defendant. Broad inquiry into possible prejudice is always permitted because bias is always a relevant subject of cross examination. *Villaroman v. United States,* (D.C.C.A., 1950), 184 F.2d 261, 21 A.L.R. 2d 1074.

The relevance of the inconsistent position of Peterson, in failing to claim in the accounting between himself and the defendant the $16,000 which he now testifies was his money paid on account of taxes, requires no discussion. Inconsistent positions are always relevant for impeachment purpose.

To summarize:

1. Defendant was denied the right to show by cross examination Peterson's bias prejudice and interest because of:

(a) Hoped for immunity from tax liability.

(b) Hope for immunity from penalties.

(c) Fear of liability or penalties.

2. Defendant was denied the right to show by cross examination Peterson's inconsistent position regarding the $16,000.

These unreasonable restraints on defendant's right of cross examination deprived him of a fair trial, and if de-

fendant's first assignment of error is denied, entitled him to a new trial.

IV.

THE UNITED STATES ATTORNEY'S ARGUMENT DEPRIVED DEFENDANT OF RIGHTS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION.

A. The settlement between Peterson and Leathers, the circumstances of the settlement, the items asserted, the work sheet defendant and his attorney showed government agent, Amos, and any other work sheet used by defendant were provable only by testimony of defendant or his attorney (Tr. 146-147, 168, 159, 165, 168).

B. The United States Attorney, in his closing argument, repeatedly referred to and commented upon the defendant's not producing these documents (Tr. 211, 214).

C. A defendant is deprived of due process and his privilege against self incrimination is vitiated if a prosecuting attorney refers to failure to produce evidence provable only by his testimony or the testimony of his attorney.

Linden v. United States (3 Cir., 1924) 296 Fed. 104.

Barnes v. United States (8 Cir., 1925) 8 F.2d 832.

State v. Swan (1946), 25 Wash. 2d 319, 171 P. 2d 222.

Yates v. United States (9 Cir., 1955) 227 F.2d 851.

Examination of each of the items whose location is referred to and which defendant's failure to produce were repetitiously charged in closing argument (Supra, p. 9) demonstrates that they were provable only by testimony of defendant or his attorney.

(a) Settlement between Peterson and Leathers.

Mr. Luckey: * * * (Tr. 211).
"Where is the settlement . . .
"What other items were asserted?
"What are the circumstances . . ."

The settlement by its nature would be within the knowledge of four people; Peterson, Leathers, and their attorneys. Peterson's attorney could not be called. When defendant sought to inquire of Peterson about the details of the settlement, the government's objection to exploration of the subject was sustained (Tr. 146-147). Therefore, by elimination, only defendant or his attorney could testify about the settlement, the items asserted in it, and the circumstances surrounding it.

(b) The Work Sheet defendant and his attorneys exhibited to the government agents and any other work sheet defendant may have used.

Mr. Luckey: * * * (Tr. 214).

"Where is such a work sheet?

"Where is whatever it was that Mr. Leathers showed to Mr. Amos at the office of Mr. Vonderheit? . . .

"Where is it?

"Where, if there is a different work sheet, if Mr. Peterson altered his work sheet and handed it to Mr. Leathers, where is it?"

Defendant and his attorney showed a work sheet to Mr. Cosper (Tr. 159), in the office of defendant's attorneys (Tr. 165). At that time, Mr. Amos also discussed the preparation of Peterson's tax with defendant and briefly saw defendant's work sheets (Tr. 168). The testimony of Cosper and Amos shows that the work sheets had to be in the possession of defendant, or his attorneys. Only defendant could testify as to work sheets given him by the taxpayer.

* * *

In closing argument, the prosecution asked interrogatories relative to the foregoing, prefaced by "where" or "what" many times (Tr. 211, 214). The law is clear that argumentative challenges to a defendant to produce evidence solely within his knowledge or argumentative reference to his failure to produce such evidence which would require his testimony is reversible error.

A closely analogous situation is found in *Linden v. United States,* (3 Cir., 1924), 296 Fed. 104, an appeal from a

conviction of violating the prohibition laws. The judge, in commenting upon the evidence pointed out that the testimony as to one count was uncontradicted. While the right of the trial judge to comment was recognized, the appellate court pointed out that the only persons present at the occasion testified to were the witnesses and the defendants. Since the only persons who could contradict the witnesses by testimony were the defendants, the comment was held to be a comment on failure to testify and the conviction was reversed.

In this case the only person other than Peterson who could testify as to the settlement was the defendant. The only persons shown to have possession of the work sheet and to be present when the work sheet was exhibited by the defendant to Amos and Cosper were the defendant or his attorneys. The only person who could testify that Exhibit 17 was not shown to defendant, was defendant. No witness testified that defendant had access to Exhibit 17.

The direct question of argument of the prosecuting attorney arose in *Barnes v. United States,* (8 Cir., 1925) 8 F.2d 832, a narcotics conviction. The alleged sale took place when only the defendant and the witness were present. The argument of the prosecuting attorney that the testimony of the witness was uncontradicted was held to require reversal despite the appellate court's belief that guilt was clear. In the case now on appeal only the defendant could testify as to the challenges made by the

prosecuting attorney relative to the settlement and the work sheets.

In *State v. Swan,* (1946) 25 Wash. 2d 319, 171 P. 2d 222, a manslaughter conviction appeal, the prosecutor had argued the failure of the defendant to call his wife. The comments on refusal to waive the husband-wife privilege were held to require reversal. The principal would encompass the defendant's attorney, the only other person shown to have knowledge of the settlement or work sheets shown Amos.

In this case we have two types of argument of the prosecuting attorney relative to the defendant's failure to produce evidence provable only by his testimony:

1. Relating to the settlement between Peterson and defendant: Peterson was on the stand as the government's witness. The government successfully objected to exploration of the settlement by examination of Peterson. Hence the only witness left to testify about the settlement was defendant.

2. Relating to the work sheet defendant showed Amos: The work sheet was in the possession of defendant. Only he, or perhaps his attorney, could have produced it. Only defendant, his counsel, and the witnesses were present. Only defendant or his counsel could testify on the subject.

As this court held in *Yates v. United States,* (9 Cir., 1955) 227 F.2d 851, at 853:

> "In our system, there is an impregnable bastion erected to protect a defendant not only against self incrimination, but even against a compulsion to testify. As long as a defendant remains within the barbican of his guarantee, protection is absolute. The prosecutor cannot comment on this silence."

Mr. Leathers remained within the barbican of the guarantee. The prosecutor commented on failure of the defendant to produce evidence equally in defendant's possession and possession of the government's chief witness, whose testimony on the point was halted by the prosecution's objection. Hence, after the successful objection only the defendant could have testified. The prosecutor commented on defendant's failure to produce evidence shown to be capable of production only by the defendant's testifying. This conduct demands reversal.

CONCLUSION

The failure to present evidence to support a conviction requires reversal and granting defendant's motion for a directed verdict. If this assignment of error is not allowed, improper admission and use of evidence, improper restraints on defendant's right to cross examine witnesses, and improper argument of the United States Attorney require reversal of the verdict and judgment below.

Respectfully submitted,

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